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No. _____

In The
Supreme Court of the United States

October Term 1997

**LOCAL UNION 7107,
UNITED MINE WORKERS
OF AMERICA, DISTRICT 28,**

Petitioners,

v.

CLINCHFIELD COAL COMPANY,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

I. WHAT PROOF IS REQUIRED FOR SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER, WHO RELIES SOLELY UPON THE DEFENSE OF 29 U.S.C. Sect. 2102(b)(2)(A) TO AVOID LIABILITY FOR FAILURE TO GIVE SIXTY DAYS' NOTICE PURSUANT TO THE WARN ACT?

PARTIES TO THE PROCEEDING

Petitioner is United Mine Workers of America, District 28, Local Union 7107, Plaintiff below. Petitioner is an unincorporated association, i.e., a labor union. Respondent is Clinchfield Coal Company, Inc., Defendant below. Respondent is a wholly owned subsidiary of Pittston Coal Co.

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PETITION FOR WRIT OF CERTIORARI

United Mine Workers of America, District 28, Local Union 7107, respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review the judgment entered in this action by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit giving rise to this petition is a published opinion , 1977 U.S. App. Lexis 23842, reprinted at App. 1 through App. 9. The opinion of the United States District Court for the Western District of Virginia, Big Stone Gap Division is an unpublished opinion and is reprinted at App. 10 through App. 18 .

JURISDICTIONAL STATEMENT

Jurisdiction lies with this Court pursuant to 28 U.S.C. Sect. 1254(1).

Judgment was entered in the United States Court of Appeals for the Fourth Circuit on September 11, 1997. No petition for rehearing was filed.

STATUTES AND REGULATIONS RELIED UPON

29 U.S.C. Sect. 2102.

Notice required before plant closings and mass layoffs.

(b)(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably

foreseeable as of the time that notice would have been required.
(b)(3) An employer relying on this subsection shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period.

20 CFR Sect. 639.9(b)(as amended 4/1/96):

The "unforeseeable business circumstances" exception under section 3(b)(2)(A) of WARN applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that 60-day notice would have been required.

(1) An important indicator of a business circumstance that is not reasonably foreseeable is that the circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control. A principal client's sudden and unexpected termination of a major contract with the employer, a strike at a major supplier of the employer, and an unanticipated and dramatic major economic downturn might each be considered a business circumstance that is not reasonably foreseeable. A government ordered closing of an employment site that occurs without prior notice also may be an unforeseeable business circumstance.

(2) The test for determining when business circumstances are not reasonably foreseeable focuses on an employer's business judgment. The employer must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately

predict general economic conditions that also may affect demand for its products or services.

STATEMENT OF THE CASE

Petitioner seeks review of the decision of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court's granting of Respondent's motion for summary judgment.

On January 28, 1994, Clinchfield Coal Co., respondent herein, gave notice to the employees of Splashdam Mine that the mine was shutting down, effective the next day. For some employees this constituted no notice; others were laid off over the following several weeks to one month.

Respondent does not challenge that it is an employer required to give 60 days' notice prior to a plant closing/mass layoff, as required by the WARN Act. Rather, it relies upon the affirmative defense of 29 U.S.C. Sect. 2102(b)(2)(A) allowing reduced notice when the layoff or closing is caused by business circumstances which are not reasonably foreseeable.

20 CFR Sect. 639.9(b)(2) amplifies the requirements to be met by an employer seeking the protection of the "unforeseeable business circumstance" exception to the notice requirements of the WARN Act. Specifically, the circumstance must be sudden, dramatic and unexpected; further, the employer must be found to have exercised such commercially reasonable business judgment as would a similarly situated employer. Finally, the employer must still give such notice as is practicable.

For thirty years, Dofasco, a Canadian corporation, was a customer of Clinchfield Coal Co., purchasing what is referred to as "McClure B" coal. Dofasco was the sole customer for coal produced by the Splashdam mine, which contributed the largest part to the McClure B blend. Beginning with the 1993 contract, Dofasco required

additional quality control of Clinchfield; Clinchfield was paid an extra $.05 per ton to perform additional testing. This emphasis apparently caused some concern to Respondent. See Memoranda dated December 16, 1992, December 21, 1992, January 19, 1993 and March 18, 1993.

Nevertheless, Clinchfield Coal Co. was unable or unwilling to meet the standards required by Dofasco. Repeatedly throughout the course of the 1993 contract term, Dofasco complained to Clinchfield about the various problems it was experiencing with the coal supplied by Clinchfield. See letter to S. F. Bartle dated July 2, 1993; letter of September 2, 1993 to George Denton; September 30, 1993 notes of meeting with Dofasco; notes of meeting October 27 with Dofasco; memo to file concerning meeting with Dofasco dated October 20, 1993; notes of meeting of December 15, 1993 with Dofasco; memo dated January 14, 1994 from J. P. McEnaney; and memo dated March 2, 1994 from D. L. Lau.

In the notes of September 30, 1993, Clinchfield is again reminded that Dofasco wants analyses prior to the arrival of the boat containing the coal. This is precisely what Dofasco indicated it needed at the outset of this contract, but Clinchfield apparently ignored this request.

Dofasco also complains on September 30, 1993 about the variance and reflectance of Clinchfield's coal; finally Dofasco complains about CSR value.

The notes of the October 27 meeting between Dofasco and Clinchfield indicate that Dofasco is disappointed in the control aspects of front line people in prep plants, that others have better procedures, and again, that Dofasco wants more statistical analysis. Even Clinchfield's own internal memo from D. L. Lau references the variability problem: Mr. Lau notes that "Pittston needs the discipline to do the process documentation."

Clinchfield repeatedly ignores the complaints of Dofasco. Indeed, according to the deposition of Thomas Tabacchi, Executive Vice President of Pittston Coal Sales

Corp., he was not even advised by the sales staff negotiating the future contract for Clinchfield that Dofasco had any complaints about Clinchfield's coal other than its CSR value. Specifically, he was unaware that Dofasco complained that other suppliers had better front line controls, he was unaware that Dofasco complained about Pittston's written procedures, he was unaware that Dofasco complained about a lack of proper statistical analyses, he was unaware of Dofasco's concerns about damage to its blast furnaces, and he was unaware that Dofasco was concerned about McClure B having too high a volatility. Depo. at 5-8. He further states that had anyone taken the time to advise him of the problems, he would have attempted to solve them. Depo. at 5-8. The only action taken in response to complaints was by George Denton, who simply prepared tables to show Dofasco that it was wrong about the CSR (see McEnaney affidavit). Thus, not only did Clinchfield fail to even attempt to correct any of the problems voiced by Dofasco, it argued with Dofasco.

On December 15, 1993, following the repeated and unaddressed complaints set forth above, Dofasco dropped a bombshell on the Pittston Sales Group staff. In the hand-written notes of Don Lau, Clinchfield representative, the variability problem is addressed. The notes further reflect that "McClure is worst high vol. coal in the plant. Operators don't want to use it--it gives lowest CSR relative to the other high vols. used. . . Ash chemistry in McClure is the driving force on CSR according to Dofasco Research, McClure has too much basicity (Iron is high) . . . Purchasing is getting heat for using McClure. They want Pittston to try to help improve CSR to keep us in the blend. . . . Dofasco prefers CSX coal--will look at NS [Norfolk Southern Railway].

Of crucial importance is the note that "in 1994 the maximum tonnage purchased will be 200,000 tons if the CSR improved. This is less than one-half of that purchased in 1993."

Clinchfield, through the deposition of James Campbell, Senior Vice President of Operations, admits that there is nothing it could do about the CSR problem. Depo. of Campbell at 8.

On January 14, 1994, nearly one month following the December 13, 1994 meeting, Joseph P. McEnaney sends a memo to "distribution" concerning the Dofasco contract, which states as follows:

> Our current and future position with Dofasco is in serious jeopardy. We have already been advised that the maximum tonnage we can hope for in 1994 will be on the order of 200,000 MT of the McClure B coal, down from last year's level of 435,000 tons. The reason for the reduction is the inability of our coal to produce satisfactory CSR results in their coke blends. This issue has been brought to our attention regularly over the last six months by Dofasco and absent our ability to resolve the problem, they have opted to go with another supplier. The tonnage which Dofasco has left open for us is not secure as yet. Dofasco still awaits our plan to improve that quality, which can only be achieved by reconfiguring the raw coal blend, and receive assurances that Pittston is at least expending its best efforts in this area. In addition to quality improvement, we will also be obliged to take a price reduction as we remain the highest priced coal in their blend.

Following this memo, no reconfiguration of the raw blend occurred, and no assurances were provided to Dofasco that Clinchfield was expending its best efforts.

On January 24, 1994, Dofasco offered Clinchfield $32.50 per ton of coal. This was better than what it had indicated--Dofasco had stated in December that unless CSR was improved, there would be no purchase whatsoever. Clinchfield rejected this offer and finally gave "notice" to its employees on January 28, 1994.

Clinchfield admits the above facts; indeed the facts are adduced exclusively from its own documents and deposition testimony. Clinchfield simply asserts that it didn't believe Dofasco, it believed that Dofasco was "posturing".

"Sudden, Dramatic and Unexpected:"

Dofasco's dissatisfaction with Clinchfield was certainly not sudden. Rather, Dofasco offered more to Clinchfield than it advised as early as December of 1993 that it would--in December, it advised that unless the CSR was improved there would be no purchase at any price. The CSR was not improved, and, per James Campbell, could not be improved.

The drop in coal price may be dramatic. The record indicates that Pittston expected a drop of $1.00 per ton; yet there is no documentation of this belief, nor is there market data to support it.

Commercial Reasonableness:

Quite simply there is no objective evidence whatsoever of commercial reasonableness. All affidavits address the personal beliefs of individual Clinchfield employees/management toward the Dofasco contract negotiating process. This not only doesn't satisfy the requirement of objective commercial reasonableness, it

ignores it. Further, the affidavits submitted wherein Thomas Tabacchi and others claim that they didn't realize there were problems are premised upon the failure of their sales staff to apprise them of the numerous and varied complaints of Dofasco. Thus, their beliefs were premised on lack of knowledge.

Disputed Facts:

Surely a reasonable factfinder could find that it is not commercially reasonable to continuously ignore the complaints of your best customer, to refuse to believe everything that customer advises you, to issue a memo indicating that a contract is in jeopardy unless certain problems are corrected and then fail to attempt to correct those problems, etc.

Several courts have considered terminations of contracts and found the actions to be commercially reasonable. Yet all of these courts have done so following a trial on the merits and often testimony from others in the industry in reaching their conclusions. See, e.g. Jones v. Kayser-Roth Hosiery, 748 F. Supp. 1276 (E.D. Tenn. 1990); Chestnut v. Stone Forest Industries, Inc., 817 F. Supp. 932 (N.D. Fla. 1993); Intern. Ass'n of Machinists v. General Dynamics, 821 F. Supp. 1306 (E.D. Mo. 1993). The analysis of the United States Court of Appeals for the Fourth Circuit lies largely in accepting the belief of Pittston that the contract would be renewed. Petitioner does not contest Pittston's belief; however, the standard to be applied is objective, not subjective. Pittston presents no evidence from any similarly situated business person.

REASONS FOR GRANTING THE WRIT

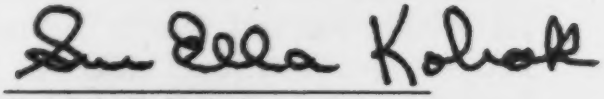
1. 1. This Court has never addressed the requirements of the unforeseen business circumstance affirmative defense to the WARN Act. Given its potential for use in every adversarial market condition, this defense is of major import in WARN Act litigation. Allowing an employer to prevail upon its summary judgment motion simply by stating "we didn't believe that they would do what they said they would do", coupled with a record devoid of evidence of objective commercial reasonableness of the employer's actions, guts the WARN Act and flies in the face of the regulations interpreting it. This result creates an important question of federal law.

There is not yet a conflict between the Circuits since no other case with similar facts has been resolved by summary judgment. In several cases, summary judgment has been denied by the United States District Court. However, if Pittston may succeed by summary judgment a conflict is inevitable since certainly some courts of appeal will require that the requirements of the regulations be met.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

Jurisdiction with the United States District Court, the Court of first instance, laid pursuant to 29 U.S.C. Sect. 2104, et seq.

For the foregoing reasons, Petitioner respectfully requests this Court to grant its petition for certiorari.



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October Term 1997

**LOCAL UNION 7107,
UNITED MINE WORKERS
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Petitioners,

v.

CLINCHFIELD COAL COMPANY,

Respondent.

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Appendix to Petition for Writ of Certiorari

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LOCAL UNION 7107, UNITED MINE WORKERS OF AMERICA, DISTRICT 28,
Plaintiff-Appellant,

v.

CLINCHFIELD COAL COMPANY,
Defendant-Appellee.

No. 96-1731

Appeal from the United States District Court
for the Western District of Virginia, at Big Stone Gap.
Samuel G. Wilson, Chief District Judge.
(CA-94-274-B)

Argued: June 3, 1997
Decided: September 11, 1997
Entered: September 11, 1997

Before HALL and MICHAEL, Circuit Judges, and TILLEY,
United States District Judge for the
Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Hall wrote the opinion, in which Judge Michael and Judge Tilley joined.

COUNSEL

ARGUED: Susan Debra Oglebay, Pound, Virginia, for Appellant. Mark Evan Heath, SMITH, HEENAN & ALTHEN, Charleston, West Virginia, for Appellee. **ON BRIEF:** Forrest H. Roles, SMITH, HEENAN & ALTHEN, Charleston, West Virginia, for Appellee.

OPINION

HALL, Circuit Judge:

United Mine Workers Local 7107 (the union) appeals a summary judgment entered in favor of defendant Clinchfield Coal Company (Clinchfield) in the union's suit challenging the closing of a mine without the 60-day notice period generally required by the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109. We affirm.

I.

Clinchfield, a subsidiary of The Pittston Company, operated the Splashdam mine in Dickenson County, Virginia. All of the coal mined at Splashdam was used in a metallurgical blend called "McClure B." The sole customer for coal mined at Splashdam was Dofasco, Inc., a steelmaker headquartered in Hamilton, Ontario. Dofasco had been a Pittston/Clinchfield customer for thirty years.

Contracts for the sale of McClure B coal to Dofasco were negotiated annually. Clinchfield's side of the bargaining was handled by Pittston Coal Sales Corporation (Pittston Coal Sales), an affiliate that specialized in coal marketing. On January 26, 1994, negotiations broke down when

Dofasco proposed a price per ton below that at which Clinchfield felt it could continue to operate Splashdam mine. On January 28, 1994, Clinchfield gave notice to the miners that the mine would close the very next day. We will describe the course of negotiations in more detail below.

The union brought this suit under the WARN Act on behalf of the displaced miners. See 29 U.S.C. § 2104(a)(5). After discovery, Clinchfield moved for summary judgment. It contended that the undisputed facts showed that the closing was due to business circumstances not reasonably foreseeable at the time notice would have been required, i.e. November 29, 1993. The district court agreed, and held further that, as required by the statute, Clinchfield had given as much notice as was practicable.

The union appeals.

II.

We review an order granting summary judgment de novo. Disputed issues of fact must be resolved in favor of the non-moving party, and reasonable inferences should be drawn in its favor as well. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-588 (1986). On the other hand, to avoid summary judgment, the non-moving party's evidence must be of sufficient quantity and quality as to establish a genuine issue of material fact for trial. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986). Fanciful inferences and bald speculations of the sort no rational trier of fact would draw or engage in at trial need not be drawn or engaged in at summary judgment. See Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 817-818 (4th Cir. 1995).

The WARN Act ordinarily requires sixty days' advance notice of plant closings or mass layoffs. 29 U.S.C. § 2102(a). It contains several exceptions, however, including one for closings"caused by business circumstances that were not reasonably foreseeable as of the time that notice would

have been required." § 2102(b)(2)(A). An employer relying on this exception must nevertheless give as much notice as is practicable and briefly explain "the basis for reducing the notification period." § 2102(b)(3). Because the WARN Act is remedial legislation, its exceptions are construed narrowly. Carpenters District Council of New Orleans v. Dillard Department Stores, Inc., 15 F.3d 1275, 1282 (5th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). Moreover, an employer relying on an exception bears the burden of persuasion. 20 C.F.R. § 639.9; International Ass'n of Machinists and Aerospace Workers v. General Dynamics Corp., 821 F.Supp. 1306, 1311 (E.D.Mo. 1993).

The Department of Labor has promulgated regulations interpreting the "not reasonably foreseeable" language. Circumstances are not reasonably foreseeable if they are "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b)(1). The employer must exercise "commercially reasonable business judgment" in predicting the demands of its market, though it need not "accurately predict general economic conditions that also may affect demand for its products or services." § 639.9(b)(2). An example of an unforeseeable business circumstance is a "principal client's sudden and unexpected termination of a major contract." § 639.9(b)(1). When confronted with an assertion that the exception applies, a reviewing court must be careful to avoid analysis by hindsight; the trail of harbingers of an unforeseen event always looks brighter in retrospect. See Loehrer v. McDonnell Douglas Corp., 98 F.3d 1056, 1061 (8th Cir. 1996) ("The Act and its regulations necessarily recognize that even the most conscientious employers are not perfect, and they thus allow needed flexibility for predictions about ultimate consequences that, though objectively reasonable, proved wrong."); Chestnut v. Stone Forest Industries, Inc., 817 F.Supp. 932 (N.D.Fla. 1993) (employer's market predictions need not be accurate so long as they are reasonable when made).

In sum, the inquiry in this case is whether, in Clinchfield's "commercially reasonable business judgment," its failure to obtain an acceptable contract with Dofasco was "sudden and expected" enough to entitle it to give but one day of notice to the miners. We now turn to the events leading up to that failure.

III.

Every year during their thirty-year business relationship, Dofasco and Clinchfield would begin negotiations in the fall for the upcoming year's contract. In 1993, Dofasco had purchased 435,000 tons of McClure B coal from Clinchfield, with an option for 58,000 more tons, at a price of $37.05 per ton.

On September 30, 1993, Dofasco told Pittston Coal Sales that it planned to buy about as much coal in 1994 as in 1993. However, Dofasco stated that it had concerns about the McClure B's coke strength after reaction (CSR), a measure of the coal's usefulness for steelmaking.[1] At this point, Pittston Coal Sales' experienced negotiators considered Dofasco's concerns to be mere posturing -- part of the jockeying for position that accompanies any contract negotiation. Nevertheless, they had George Denton, a technical expert and vice-president of another Pittston subsidiary,[2] test McClure B's CSR. Denton's tests showed that the 1993 coal was of as high a quality as that of earlier years.

On December 15, 1993, negotiations resumed in Ontario. Dofasco again brought up CSR. Moreover, it informed Clinchfield that it would buy less coal in 1994. The parties had not yet discussed price, but, based on the general

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1 CSR was the predominant, though not the only, quality problem Dofasco had with McClure B coal. For example, Dofasco also complained about McClure B's excessive variability.

2 Pittston Coal Marketing and Development Company.

coal market, Clinchfield expected the price to be about a dollar per ton less than in 1993.[3]

Dofasco's reiteration of its CSR concerns apparently began to trouble Pittston Coal Sales. On January 14, 1994, its senior vice-president and chief negotiator, Joseph McEnaney, wrote a memorandum to management summarizing Pittston's 1994 metallurgical coal business. Here is what he had to say about Dofasco (emphasis added):

> Our current and future position with Dofasco is in serious jeopardy. We have already been advised that the maximum tonnage we can hope for in 1994 will be on the order of 200,000 [tons] of the McClure B coal, down from last year's level of 435,000 tons. The reason for the reduction is the inability of our coal to produce satisfactory CSR results in their coke blends. This issue has been brought to our attention regularly over the last six months by Dofasco and absent our ability to resolve the problem, they have opted to go with another supplier. The tonnage which Dofasco has left open for us is not secure as yet. Dofasco still awaits our plan to improve that quality, which can only be achieved byreconfiguring the raw coal blend. and receive assurances that Pittston is at least expending its best efforts in this area. In addition to quality improvement, we will also be obliged to take a price reduction as we remain the highest priced coal in their blend.

Clinchfield contends that, at this point, its negotiators still fully expected to get a contract with Dofasco for 200,000 tons at about $36 per ton, and that it could have continued to

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[3] The notes taken by a Clinchfield negotiator at the December 15 meeting reveal that Dofasco considered Clinchfield's "current price" to be "too high in today's market" and that Clinchfield "[n]eed[ed] to do something on CSR to establish value."

operate the Splashdam mine for at least four months at that tonnage and price. It presented affidavits to that effect, including one from McEnaney himself. Nonetheless, on January 26, Dofasco made a take-it-or-leave-it offer to purchase 200,000 tons at $32.50 per ton, about ten percent less per ton than Clinchfield expected. It took Clinchfield two days to recover from its "shock" at this offer, to analyze its economic consequences, and to conclude that it had no choice but to decline it and close the Splashdam mine. It gave a one-day WARN notice on January 28.

We agree with the district court that there is no genuine issue of material fact over whether notice could have been given sixty days before the closing (November 29, 1993). There is no evidence that before December Clinchfield had any real worries about a renewal of the contract on acceptable terms. Vis-a-vis the 60-day period, it is clear that the loss of the Dofasco contract was not reasonably foreseeable.

IV.

Much less clear, however, is whether a reasonable trier of fact could find that the contract loss was no longer"sudden and unexpected" as of some time in December or January. Indeed, the union asserts that McEnaney's January 14 memorandum itself creates a triable issue of fact.

Clinchfield asserts that price -- and price alone-- caused its deal with Dofasco to fall through. This argument points in the right direction but is a tad too pat. Dofasco had emphasized its view that McClure B coal was not of optimal quality for its purposes, and that view inevitably influenced the amount it was willing to pay for the coal. The quality of goods affects demand for them; the day-old doughnuts are half-price for a reason. In fact, on January 24, 1994, Dave Mothersill of Dofasco told McEnaney that McClure B was

only "worth" $32.50 a ton.[4] This statement clearly reveals that quality, in addition to the general supply of and demand for coal as a commodity, affected the price Dofasco ultimately offered.

On the other hand, Dofasco did ultimately offer to buy a substantial amount of McClure B coal. The union does not contend that Dofasco's offer was insincere or was made with the intention that it be rejected. Indeed, though the price per ton offered"shocked" Clinchfield, it was not self-evident that Clinchfield could not accept Dofasco's terms. Only after two days of economic analysis did Clinchfield conclude that accepting the offer was not in its best interests. In the end, then, there was not a sudden and unexpected termination by Dofasco. Instead, there was an economic decision by Clinchfield to stop selling McClure B coal to Dofasco.

This decision could not have been made at any time before it was made. While a trier of fact could perhaps find that Clinchfield should have expected a price somewhat below its $36 market-based estimate, the parties had simply not addressed price in any specific way before the last week of January 1994. That both sides negotiated for so long without settling on price is mute -- but powerful-- testimony to their expectation that price would not make or break the deal.

In this regard, we cannot ignore the longstanding business relationship between Clinchfield and Dofasco. For thirty years they had met at the bargaining table, and for thirty years they had come up with a deal. This fact alone cannot be dispositive. On the other hand, a lengthy relationship builds a sense of security; the more storms weathered, the fewer feared.[5] The airing and smoothing over of difficulties, real or postured, is central to the negotiator's

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[4] Mothersill did not then offer to buy at that or any price.

[5] See Jones v. Kayser-Roth Hosiery, Inc., 748 F.Supp. 1276 (E.D.Tenn.1990) (In light of 30-year business relationship with retailer, manufacturer's belief that retailer's complaints could be satisfactorily addressed was commercially reasonable).

art, and detecting a deal-breaking grievance among deal-molding gripes is a skill acquired only through experience. Clinchfield's negotiators had that experience, both in general and with Dofasco. They expected an offer to buy coal, and they got one. They could not have reasonably foreseen that Clinchfield would be unable to accept it.

The judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

LOCAL UNION 7107,
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28,

Plaintiff,

CLINCHFIELD COAL COMPANY, INC.

Defendant.

Civil Action No. 94-274-B

Entered: April 29, 1996

MEMORANDUM OPINION

This is an action pursuant to the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (1995) (the "WARN Act"), by Local Union 7107, United Mine Workers of America, District 28 ("UMWA"), against Clinchfield Coal Company ("Clinchfield"). UMWA alleges that Clinchfield violated the WARN Act when it gave its employees only one day's notice of the shutdown of the Splashdam Mine in Dickenson County, Virginia in January of 1994. Clinchfield asserts that the mine was closed suddenly as the result of business circumstances which were not foreseeable at the time that notice would have been required under the statute, and that it meets an exception to the general notification requirements. The matter is currently before the court on defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The court finds that there is no genuine issue

of material fact and that Clinchfield's actions fell within a statutory exception to the notification requirements of the WARN Act. Accordingly, the court will grant defendant's motion.

I.

Clinchfield owned and operated the Splashdam Mine in Dickenson County, Virginia. Splashdam produced coal that was processed with coal from other mines to produce a blend called McClure B coal. This coal was used primarily in steel making, although Clinchfield had a "longstanding strategy" of reducing "its exposure to the mettalugical coal market." (Pl. Ex. I.) Since the 1960s, Clinchfield had yearly coal contracts with Dofasco, Inc. ("Dofasco"), a Canadian steel manufacturer. Over the years, Dofasco purchased vast amounts of coal from Clinchfield and was the sole buyer of coal produced at the Splashdam Mine. Clinchfield and Dofasco negotiated contracts for the sale of coal on a yearly basis. Negotiations began in the fall each year and continued until contracts were finalized, usually in January of the following year. (Def. Ex. B.) Beginning in 1993, Dofasco required that Clinchfield conduct additional quality testing and provide testing results with its coal shipments. (Pl. Ex. II.) Clinchfield representatives also attended an information session at Dofasco's corporate offices in Canada during which Dofasco emphasized quality control of the coal. (Pl. Ex. II.) The contract negotiated for 1993 was for the sale of 435,000 tons of McClure B coal, with the option for an additional 58,000 tons, at a price of $37.05 per ton. (Def. Ex. B.)

Negotiations for the 1994 contract began in September of 1993. At a meeting on September 30, 1993, Dofasco representatives told Clinchfield negotiators that Dofasco planned to use approximately the same amount of coal as it bought in 1993. (Def. Ex. B at 2). However, Dofasco expressed concern about the "coke strength after

reaction" of McClure B coal. This was essentially a coal quality issue. Clinchfield considered this to be typical posturing in the negotiation process. Quality issues are often a normal part of coal contract negotiations. (Def. Ex. B & C) Clinchfield had George Denton, a vice-president and its technical expert, review the coke strength issue and report to Dofasco. Denton's tests revealed that the coke strength of the 1993 coal sold to Dofasco was the same as in previous years. (Def. Ex. C). In December of 1993, Clinchfield representatives again went to Canada to negotiate with Dofasco. At that meeting, Dofasco informed them that the amount of coal to be purchased would be less than in 1993 unless the coke strength issue was resolved. Clinchfield expected the price per ton for the 1994 order to be about a dollar less than the 1993 price due to a general softening in the coal market. (Def. Ex. B. at 2.) In a January 14, 1996 memo, Clinchfield's negotiator, Joseph McEnaney, acknowledged that Dofasco was only going to buy 200,000 tons in 1994 compared to 435,000 tons in 1993, and stated that the relationship with Dofasco was in "serious jeopardy." (Def. Ex. B(E).) Despite the reduced tonnage, Clinchfield still expected to finalize a contract with the sale price approximately only a dollar per ton lower than the previous year and expected that Splashdam would continue to operate. (Def. Supplemental Ex. A.) However, when Dofasco and Clinchfield discussed price on January 26, 1994, Dofasco said it would only offer $32.50 per ton compared to approximately $36 per ton that Clinchfield expected. Dofasco said that $32.50 was a final offer that it needed a quick response. This lower offer was a shock and a surprise to Clinchfield. (Def. Ex. B at 6-7.) After determining that it could not economically operate Splashdam at the offered price and that there would be no other buyer, Clinchfield decided to reject Dofasco's offer and shut down the mine. Clinchfield gave notice on January 28, 1994, that the mine would close, and on January 29, 1994, closed the mine and

laid off the mine workers. The UMWA, as representative of the mine workers, then brought this WARN action.

II.

To prevail on a motion for summary judgment under Federal Rule of Civil Procedure 56, the moving party must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). If the moving party shows that there is no genuine issue of material fact, the burden shifts to the non-moving party to "set forth specific facts" demonstrating a material factual dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). In considering defendant's motion for summary judgment, the court views the underlying facts and reasonable inferences therefrom in the light most favorable to the UMWA, the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The WARN Act provides in pertinent part:

[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order-

(1) to each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; and

(2) to the State dislocated worker unit . . .and the chief elected official of the unit of local government within which such closing or layoff is to occur.

29 U.S.C. §2102(a).[1] The basic purpose of the WARN Act sixty-day notification period is to protect workers from sudden layoffs and unemployment by giving them time to prepare for a plant closing. See Jones v. Kayser-Roth Hosiery, Inc., 748 F.Supp. 1276, 1283 (E.D. Tenn. 1990). In addition to setting forth the general rule that written notice be given sixty days before a plant closing, the statute also provides certain expectations, cases in which an abbreviated period is sufficient. See 29 U.S.C. § 2102(b).

Under the so-called "unforeseeable business circumstances" exception, "[a]n employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required." 29 U.S.C. § 2102(b)(2)(A). Even under the exception, however, the employer must give as much notice as is practicable. Clinchfield contends that the Act did not require it to give sixty days notice because the closing of Splashdam Mine was "caused by business circumstances not reasonably foreseeable when notice would have been required." The union maintains that the business circumstances exception does not apply in this case because the termination of the Dofasco contract and the closing of Splashdam were foreseeable.

Although the WARN Act itself offers no guidance beyond its plain language, the Department of Labor has promulgated regulations interpreting the language of the exception. Business circumstances which are not foreseeable are those "caused by some sudden, dramatic, and unexpected action or condition outside the employer's control." 20 C.F.R. § 639.9(b). The focus of the inquiry in determining whether certain business circumstances were

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[1] Defendant concedes that the WARN Act applies to it as an "employer" and that the closing of the Splashdam Mine was a "plant closing" under the statute. 29 U.S.C. § 2101(a)(1) & (2).

reasonably foreseeable is the employer's "business judgment." Id. As the regulation states, the employer:

> must exercise such commercially reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market. The employer is not required, however, to accurately predict general economic conditions that also may affect demand for its products or services.

20 C.F.R. § 639.9(b)(2). Examples of unforeseeable business circumstances includes a strike at a major supplier, a dramatic major economic downturn, and a "principal client's sudden and unexpected termination of a major contract." § 639.9(b)(1).

Several district courts have recently looked at the business circumstances exception in the context of terminated or lost contracts with principal clients. A brief review is instructive. In Wholesale & Retail Food Distrib. Local 63 v. Santa Fe Terminal Servs. Inc., 826 F.Supp. 326 (C.D. Cal. 1993), the employer ordered a mass layoff after its sole customer, which was also the employer's parent company, terminated its contract. Although the employer and the customer had several of the same directors, and despite the fact that the customer had expressed dissatisfaction with the employer's performance of the contract, the court found that the termination was an unforeseeable business circumstance. Id. at 332.

In a similar case, International Association of Machinists & Aerospace Workers v. General Dynamics Corp., 821 F.Supp. 1306 (E.D. Mo. 1993), the court found that the termination of a defense contract was an unforeseeable business circumstance. General Dynamics involved a contract for production of the A-12 attack aircraft, which the government later terminated. From the beginning, the A-12 program had been behind schedule and over-budget. The Navy, at one time, told the employer that the A-

12 contract was in jeopardy. The employer knew that the government was reviewing the contract and that the Secretary of Defense had issued a "show cause" letter asking why the contract should not be terminated. Id. at 1310. Despite these facts, the court found that the government rarely terminated defense contracts and that General Dynamics exercised commercially reasonable business judgment in believing that the A-12 contract would be terminated. Id. at 1312. No WARN violation occurred. The court in General Dynamics found an earlier case, Jones v. Kayser-Roth Hosiery, Inc., 748 F. Supp. 1276 (E.D. Tenn. 1990), helpful. The Kayser-Roth case involved the manufacture of women' hosiery. Penny's had been a Kayser-Roth customer for over thirty years and was its most profitable account. Penny's began to express grave concern about the quality of the merchandise delivered by Kayser-Roth. After months of complaints, Penny's terminated the contract, Kayser-Roth was forced to close its factory. The court found that based on the long relationship between the parties, the efforts made for improvement, and some signs of improvement, Kayser-Roth used commercially reasonable judgment in believing that the contract would not be terminated. Id. at 1287-88. Despite the complaints raised by the customer, the customer concluded that the employer exercised reasonable business judgment.

As in the case reviewed above, the court finds that the business circumstances exception applies in this case. Clinchfield and Dofasco had been doing business with one another for thirty years. Year in and year out negotiations began in the fall with contracts concluded in January of the following year. In September of 1993, Dofasco told Clinchfield that it expected no change in the amount of coal that it would buy in 1994. Clinchfield expected a slightly lower market price for the coal, approximately one dollar less than the 1993 price. It was not until December 15, 1993, that Clinchfield learned that the tonnage to be purchased would be less than half of the previous year's purchase.

However, even at the tonnage the Splashdam Mine would have continued to operate. On January 14, 1994, Clinchfield's top negotiator wrote in a memo that the contract was in serious jeopardy, but continued to believe that a contract with the thirty year customer would be concluded at a reasonable price of the coal. Clinchfield quickly determined that Splashdam could not operate at that price. Clinchfield rejected the offer and gave notice on January 28 that it would close the mine on January 29.

Under the WARN Act's sixty day rule, notification of the January 29, 1994 Splashdam closing would have been required on November 29, 1994. However, at that time Clinchfield had no indication that Dofasco would fail to renew its coal contract at a reasonable price. On the contrary, Dofasco had indicated that it would renew the contract on terms similar to the 1993 contract. The court finds that at the time that WARN notice was required, Clinchfield exercised commercially reasonable judgment in believing that the contract would be renewed and that Splashdam would continue to operate normally.

Under the WARN Act, however, an employer must give notice as soon as practicable. Thus, the court must also determine whether notice should have been given before it actually was, on January 28, 1994. The court funds that Clinchfield was not required to give notice before it did. Although Clinchfield's negotiator informed it that the contract was in jeopardy on January 14, it nevertheless believed that the contract would be renewed, as it had been time and again for thirty years. Clinchfield was permitted to rely on its business judgment that a contract would be finalized given the fact that Dofasco was a thirty year customer, quality issues were a normal part of the bargaining process, and Clinchfield's experts had reviewed the coal quality. Dofasco's final low offer shocked Clinchfield on January 26, and Clinchfield gave WARN notice when it realized that the mine could not operate at that price and that no agreement would be reached. The loss of the Dofasco

contract was the loss of a major contract with a principal client, as contemplated by the WARN regulations. 20 C.F.R. § 639.9(b)(1). Dofasco's exceptionally low offer was out of Clinchfield's control, and unexpected. See § 639.9(b). Clinchfield's belief that the contract would be renewed for the less tonnage at a commercially reasonable price was well within the broad range of commercially reasonable business judgment. It unfortunately happened to be wrong. Clinchfield gave WARN notice as soon as it realized that it could not operate Splashdam without the contract. Accordingly, the court finds that the business circumstances exception applies in this case, and that Clinchfield fulfilled is obligations under the WARN Act.

III.

Based on the foregoing, the court finds that Clinchfield met its notification requirements under the WARN Act when it closed the Splashdam Mine based on the loss of the Dofasco contract which was a business circumstance not reasonably foreseeable. Clinchfield's motion for summary judgment will be granted. An appropriate order will be entered this day.

ENTER: This 29th day of April, 1996.

/s/_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

LOCAL UNION 7107,
UNITED MINE WORKERS OF AMERICA,
DISTRICT 28,

Plaintiff,

v.

CLINCHFIELD COAL COMPANY, INC.,

Defendant.

Civil Action No. 94-274-B

Entered: April 29, 1996

FINAL ORDER

In accordance with the Memorandum Opinion entered this day, it is hereby

ORDERED AND ADJUDGED

that Defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 is **GRANTED**. This matter is stricken from the docket of the court.

ENTER: This 29th day of April, 1996.

/s/_____
UNITED STATES DISTRICT JUDGE